IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No.

MEURER STEEL BARREL COMPANY, INC.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR A WRIT

Opinions Below

The opinion of the United States Circuit Court of Appeals for the Third Circuit rendered by McLaughlin, Circuit Judge, concurred in by Dobie, Circuit Judge and Kolodner, District Judge (R. 265-271) is not yet officially reported. The memorandum findings of fact and opinion rendered by Sternhagen, Judge of The Tax Court of the United States (R. 238a-263a) is not officially reported but is unofficially reported in 1943-1944 P-H Tax Court Memorandum Decisions service, ¶43,112 and a memorandum thereof appeared in '433 CCH, ¶7239, M.

Grounds on Which Jurisdiction is Invoked

The basis of this court's jurisdiction is set forth in the petition.

Statute and Regulations Involved

Revenue Act of 1936, Section 115(c) and Regulations 94, Article 22(a)-21 are involved. They are printed in Appendix B attached.

Statement of the Case

Petitioner in 1936 was a New York corporation engaged in the business of manufacturing steel barrels with a plant in Newark, New Jersey. It had 14 stockholders, principally members of the Meurer and Young families, besides one Charles L. Jones, who had 2,000 common shares out of 5,000 shares issued and received by him incident to sales increase (R. 266). Petitioner's general counsel, Emanuel A. Stern, represented Margaret C. Meurer and her daughter, Mae F. Meurer individually (R. 266). Mrs. Meurer was president of the company (R. 241a). Jones at that time consulted Stern regarding an option on all outstanding shares of petitioner for the purpose of selling them on his projected trip west (R. 266; 239a). Negotiations between Stern and Jones commenced in August 1936 and ended on January 12, 1937 with the execution and delivery of a unilateral written option grant from all shareholders of record as vendors to Jones as optionee for a fixed price per share within a given time (R. 239a; 266). The option recited that the optionee "is desirous of obtaining an option to acquire (directly or indirectly as hereafter set forth), all the assets and goodwill" of the petitioner (R. 150a; 239a; 266),

excepting securities and a patent claim owned by the petitioner, described as "exclusions" (R. 240a; 266).

The option grant specifically covered shares of stock not business assets, and in the event of its exercise, the optionors were free, according to its terms, to deliver to optionee, either shares of petitioner or shares of a new corporation to represent petitioner's assets, other than the "exclusions" (R. 150a).

Time was expressly declared to be of the essence of the option (R. 154a); it was not exercised within the given 90 day period (150a); but its period was extended from time to time at the request of optionee or his attorney (R. 241a; 242a).

A comprehensive detailed plan for complete liquidation of the petitioner in a period not running beyond two years from the close of the taxable year 1937 was formally adopted on July 15, 1937 at an adjourned stockholders' meeting first called by notice issued June 28, 1937 to which the bulk of the shareholders had consented in advance July 6, 1937; in principle the stockholders had previously approved liquidation July 9, 1937 (R. 46a-47a; 266-267, 161a-165a).

The plan of July 15, 1937 provided for a series of distributions of which the first was to be a liquidating dividend in kind of the business assets of the petitioner distributable July 17, 1937 (R. 242a). Implementing resolutions providing for such distribution were adopted and the actual distribution by deed of conveyance from the petitioner occurred at noon of July 17, 1937. At the time fixed for such distribution the only persons entitled thereto were five individual stockholders who had formed a copartnership evidenced by memoranda in writing, certificate of trade name, opening of books of account,

and related acts (R. 244a, 188a, 190a). To the five partners the petitioner, on July 17, 1937, transferred the assets of its barrel manufacturing business, including the right to use its name, of a then determined net value of $500,000 (R. 245a). The transfer was by means of separate instruments of conveyance and assignment (R. 192a; 195a) and simultaneously the partnership assumed all of petitioner's stated liabilities incurred prior to the transfer date as required by the resolutions respecting the distribution (R. 242a, 243a, 245a, 197a). The assumption instrument executed by the partners on July 17, 1937, recited that the distribution had occurred pursuant to the plan for complete liquidation and dissolution adopted July 15, 1937 (197a). Simultaneously with execution and delivery of such conveyance and bill of sale, certificates of all outstanding shares[1] were cancelled and redeemed to the extent of the declared value of the first liquidating dividend. The partnership operated the business from July 17, 1937 to August 6, 1937 and the profits of the business derived by the partnership from July 17th to July 30th were distributed to the partners.

In the meantime, on the date of the corporate meeting at the Meurer home on Long Island July 9, 1937 (R. 164a, 241a) Stern was approached in New York by Green and an associate, member of the New York law firm of Breed, Abbott & Morgan, representing Jones, with the request for a further extension of the January option on shares, pending negotiation of an agreement contemplating the purchase of business assets instead of shares.

1. A relatively small number of certificates owned by a deceased shareholder were not cancelled until later, although there was uncontradicted testimony that sale of said minority shares to the partnership was orally concluded prior to the distribution, with the legal details completed later (R. 245a, 246a; 103a).

The attorneys did not then disclose who the prospective purchaser (R. 242a) was. However they did not wish to carry out the purchase of a manufacturing plant under a document such as the share option (R. 242a). The option was extended to July 19, 1937 "in order that terms of a contract of sale could be negotiated" (R. 267) and a further extension was granted as requested on July 17, 1937 (R. 245a). Negotiations were conducted exclusively by and between Stern for prospective vendors, and Green and associate, for prospective purchaser. From the outset of the negotiations the purchaser was made aware of the liquidation of the petitioner, formation of the partnership, transfer of the barrel business to the partnership and intention of the partners to make the sale, if any eventuated. It was immaterial to the purchaser from whom the assets were purchased "but assets and not stock were what it wished to buy" (R. 246a). Its attorneys demanded and received proof that the partnership owned the assets (R. 246a). The negotiations were concluded on July 22, 1937, on which day the five partners signed as vendors and the contract was delivered (R. 246a). The contract of sale delivered on July 22d differed in its terms from the option agreement of January 12, 1937, principally in the respects indicated in the chart attached as Appendix A, although no finding with regard to such variances was made below. The option and contract are both in evidence (R. 150a-156a; 199a-214a). The purchaser's attorney testified that he did not consider his client obligated until the contract was actually delivered on July 22d (R. 129a-130a) and that it contained "quite numerous changes from the terms of the deal as contained in the option and also considerable additions to the deal" (R. 142a). Both vendors' attorney and pur-

chaser's attorney testified that all terms of the contract had not been agreed upon at the time the last sheet was signed by the purchaser's executive while he was on a trip east July 17, 1937 (R. 267; 64a, 65a, 87a, 88a, 129a-130a, 138a, 142a); that such signature was accompanied by an escrow delivery to purchaser's attorney.

Further distributions by the corporation to its shareholders continued from time to time pursuant to the July 15th plan (R. 242a, 253a; 267). Separate distributions by the partnership of capital and income were made to the partners personally (R. 72a, 74a, 249a-250a). The interest of the partners in the partnership was proportionate to their contribution of shares or liquidating dividends, as the case may be, and it was on that basis that the distribution by the partnership occurred (R. 250a, 237a).

The deposit monies of $50,000 under the contract of sale between the partnership and Rheem was paid by check to the order of the partnership and deposited in the partnership account (R. 215a-216a). All subsequent payments under such sales contract as well as the notes and mortgage securing the same, went directly to the partnership and were distributed to the partners through the partnership account (R. 223a).

The business assets were transferred by the partnership to the purchaser on August 6, 1937, with adjustments computed to July 30, 1937 pursuant to the contract terms. Numerous title documents delivered at the closing showed the title at the time of such final closing to be in the partnership and derived from the petitioner under the adopted July 15, 1937 plan of liquidation (R. 220a-236a; 246a).

Petitioner engaged in no further business after July 17, 1937; it proceeded to collect its accounts, dispose of its securities, pay its debts and distribute its remaining assets

within its scheduled time fixed by the plan and minutes (R. 105a, 101a, 80a, 247a). The Secretary of State at Trenton, New Jersey, was informed on ~~that day~~ July 17, 1937 of its intention to discontinue business (R. 246a).

Dissolution Certificate was issued by the Secretary of State October 24, 1938 (R. 247a).

Reduction in the deficiencies effected by The Tax Court decision resulted from that court's sustaining five of the contentions of the petitioner respecting errors of the commissioner (¶¶3, 4a, 4b, 4d and 5 of opinion, R. 247a), no longer involved. The Circuit Court for the Third Circuit affirmed with opinion.

Specification of Errors

The Circuit Court of Appeals and The Tax Court erred:

1. In holding that petitioner at any time had as an end in view, the sale of its business assets to Rheem, or shaped events to accomplish that end.

2. In failing to hold that the petitioner's conveyance of business assets to the partnership required separate recognition as one of a series of distributions under an adopted plan of complete liquidation, within the scope of Section 115(c) of the Revenue Act of 1936.

3. In holding that petitioner at any time participated in negotiations for the sale of business assets to Rheem.

4. In concluding that the partners' ownership of business assets was not bona fide, absolute and unrestricted.

5. In distinguishing, instead of holding applicable and following, the second circuit court decision in *Chisholm* v. *Commissioner,* 79 F. 2d 14, and the fifth circuit court decision in *Commissioner* v. *Falcon,* 127 F. 2d 277.

6. In attributing to the petitioner, the sale of business assets made by the partnership to Rheem.

7. In adding to petitioner's income for 1937 the partnership gain on sale of their business assets to Rheem, and redetermining a deficiency, instead of overpayment, in income tax and excess profits tax for 1937.

8. In affirming the decision of The Tax Court.

Summary of Argument

The principal question is whether the sale of business assets involved here is attributable to the corporation rather than to its stockholders who received such assets as a distribution in kind in connection with petitioner's dissolution under a previously adopted plan. The Tax Court erroneously concluded that the sale was attributable to the petitioner for tax purposes and based it on erroneous inferences, without a shadow of support in the evidence: (1) that each event in the series leading to ultimate sale of the assets to Rheem was a step (R. 255a) in a unified integrated plan on petitioner's part to make such sale, although the declared purpose and expressed intention were directly to the contrary; (2) that the partnership was merely a straw entity (R. 254a) concocted as an interim ownership of form but not substance that should be disregarded, which inference was in direct contradiction to the executed documents and related evidence of intention. The Tax Court rejected all relevant evi-

dence to reach its erroneous inference (3) that there was a pervading corporate intention to sell which preceded and dominated the liquidation instead of finding, as impellingly required by the undisputed evidence that a fixed and declared intention on petitioner's part to liquidate preceded, and was consummated before, any individual intention on the stockholders' part to sell was brought to fruition.

Though wide latitude is allowed to The Tax Court in integrating or recognizing as unrelated apparently separate events and transactions, the Dobson case (*Dobson* v. *Commissioner,* 320 U. S. 489), it is respectfully submitted, has not gone to the lengths urged below, of forming a cloak to cover an utter and complete failure of proof in support of the court's drawn inferences.

ARGUMENT

I

No substantial evidence supports the Court's inferences upon which have been projected its erroneous conclusion attributing the sale to the petitioner.

Every element required by sub-section (c) of Section 115 of the Revenue Act of 1936 (Appendix B) is to be found in what actually was done by petitioner, namely a statutory distribution whereof the first of a series in complete cancellation and redemption of all petitioner's stock was effected in accordance with a duly adopted and implemented bona fide plan of liquidation.

1. There is *no evidence* whatever *of* any *negotiations* for the sale of business assets by or *on behalf of the peti-*

tioner at any time either before or after the liquidating dividend distribution.

2. The first *liquidating dividend* was declared by the petitioner, and *distributed* and accepted by the partnership *prior to* execution and delivery by the partnership of the *contract of sale* of the business assets involved therein. Negotiations with respect to the acquisition of the business assets by Rheem were not concluded by the partnership and purchaser until five days after title had vested in the partnership. The purchaser was informed —at the outset of its negotiations for a contract to purchase business assets, instead of shares of stock—of the impending acquisition of title by the partnership; the purchaser was kept informed of the corporate proceedings which vested such title in the partnership; the purchaser demanded and received proof of the partnership title acquired under the liquidation plan; the purchaser at all times during the negotiation of terms knew that an eventual sale, if consummated would be from and by the partnership and not the petitioner; the contract of sale was made and signed by the five individual members of the partnership as such and not by petitioner.

3. Transfer of the business assets to the partnership was made and accepted as a declared step in a series of liquidating distributions under a previously adopted plan of liquidation contemplating such complete liquidation and dissolution within two years from the close of the taxable year when so adopted. It was set in motion by implementing resolutions adopted July 15, 1937, seven days before the terms of the sales contract were mutually agreed upon and the contract delivered. The plan of dissolution was approved in principle July 9, 1937, pur-

suant to proxies executed by the stockholders July 6, three days before the negotiations for the sale of assets had even begun; the initial shareholders' meeting of July 9th had been called by notice issued June 28th, eleven days before commencement of the negotiations (R. 161a-166a).

4. The option grant of January 12th bound the shareholders individually, not the corporation; it covered shares of stock, not business assets; it was unilateral and bound optionors, not optionee; during its negotiation the shareholders' attorney had informed shareholders that he would never recommend sale by the corporation because "of the possible extraordinary taxes that would have to be paid."

5. No obligation either of Jones or his assignee to exercise the January option was ever assumed or disclosed prior to the time when title to the business assets vested in the partnership.

6. There is no evidence that at the time of title vesting on July 17th, either the partnership or the petitioner was under any oral or written obligation to sell either business assets or shares to Jones or his assignee upon the terms which ultimately were embodied in the concluded contract of sale. The ultimate sales contract which emerged at the conclusion of the negotiations July 22, differed in a number of important respects from the provisions of the option agreement. The chart attached as Appendix A shows the principal variations. One important variance was with relation to the $50,000 liquidating damage clause in the event of the failure of the purchaser to complete; it was present in the option grant but absent from the sales contract. There is no showing what-

ever that the purchaser was ever ready to exercise the original option grant, either on shares or equivalent assets, without such variances.

7. The alternative desire of optionee with relation to a "direct" acquisition of assets, expressed in the January grant, was not a burden of optionors at that time—nor did optionors' subsequent acquiescence therein, *after* they were free so to do or not to do, as they might elect, *i.e.,* after distribution in liquidation, relate back so as to bind them thereto, from the option date. This subsequent acquiescence made the ultimate contract an entirely new deal, regardless of whether so termed in the contract itself. The option grant bound optionors only to the "indirect" alternative, *i.e.,* "shares" of stock (R. 150a, 151a).

8. The partnership was organized for and served a useful business purpose during its ownership and operation of the barrel business—it was not a paper conduit for transfer of assets from petitioner to Rheem, and was not so intended. The learned courts below failed to note that even the original option grant contemplated an alternative method of delivery of the subject matter of that option "shares", by choice of the optionors alone, namely their delivery of shares of another corporation which they were free to organize to acquire the business assets represented as the direct objective of the optionee's desire (R. 150a. ¶2d). The true test of ownership significance lies not in the length of its duration but in the genuineness thereof: here the partners' ownership of the business assets was not a hollow, inert, vacuous tenure, but represented real activity in the barrel business. This it owned, operated and ran from the time of its acquisition under the liquidating dividend distribution, July 17th at noon, to its

ultimate transfer thereof August 6th. The first five days of such ownership from the 17th to the 22d was a period when no one could say that the long protracted negotiations would ever culminate in an executed contract of sale. When the option grant was given, all that was contemplated under its terms in order to consummate the deal expressed thereby, was a simple notice of exercise thereof accompanied by a $50,000 down payment. At no time did the optionee's assignee ever evince an intention or readiness to perform that simple act or otherwise subject itself to the risk of losing the $50,000 down payment as liquidated damages in the event it failed to perform under the purchase contract that would follow the option's exercise. The remaining period of the partners' business life, so far as it concerned barrel operations, was, it is true, hedged in by voluntarily assumed conditions under the July 22d contract, safeguarding the purchaser against wastage, such as any prudent buyer might well require. The risks of the partnership business activity, however, were borne, and the profits accrued, not to the petitioner, nor to the optionee, but to the partnership itself. Its scope and volume of operations during such fortnight period of activity was not insignificant—gross receipts were $232,-068.58 and inventory sale was $176,100, against a corresponding initial inventory of $139,174.55 at the commencement of partnership operations. Green, the purchasers attorney, testified repeatedly under direct, as well as cross-examination, that he dealt with the partners through their attorney, believing them in fact to be the owners after the first step in liquidation had gone through, that he went through no "forms", had no hand in the dissolution itself and demanded and accepted proofs of the partners ownership precisely as he would in any case

where he represented a prospective purchaser in a matter of importance and wanted to be certain he was dealing with the right parties (R. 139a-140a).

If the partnership were intended as a mere conduit for the corporation it would have been wholly unnecessary for the partners to acquire all the other outstanding shares or their rights in the first liquidating dividend.

9. Nothing in the record permits the inference indulged in by the courts below that the petitioner intended a distribution of proceeds of ultimate sale of the business assets as the liquidating dividend instead of the net value of those assets at the time of distribution. The expressed intention of petitioner was to distribute business assets, not the proceeds of sale of such assets. The assets when delivered to the partnership were free assets, unburdened by any obligation on the part of the petitioner with relation to their retention or sale.

10. Distribution of the business assets by the petitioner to the partnership was absolute, unconditional and unrestricted. Simultaneously with such conveyance all certificates of shares of the capital stock of petitioner were cancelled and redeemed to the extent of the declared value of the first liquidating dividend (R. 246a) so distributed.

These acts of conveyance and share reduction were irrevocable. Thereby the tax consequences to the stockholders became fixed. They were subjected immediately to an admitted liability for tax on the gain reflected by the difference between the cost of their shares and the value of the distribution. Such tax consequence was not dependent upon the ability of the negotiating parties to reach a meeting of minds. Moreover there was no

obligation on the partners' part at the time the distribution occurred to depart to the slightest extent or least degree from the terms of the January option grant. Had they held to their terms and the purchaser failed to recede from his demand for substitution of assets for shares, the partners would still have been liable for the tax consequences of their receipt of the liquidating distribution of July 17th. All these necessary implications and consequences are entirely ignored by the inferences, conclusions and implications of the courts' reasoning with respect to the transactions involved.

The court is not called upon to consider what inference might have been drawn if the option were, in fact, exercised according to its terms—which it was not—after, or before the corporate distribution had occurred. Even there however if the second circuit decision of *Chisholm* v. *Commissioner* (79 F. 2d 14) had been followed, the sale necessarily should have been attributed to the partnership as reported and not to the petitioner.

The partners were not agents of the petitioner when they sold their business assets to Rheem. There was no oral or written contract of agency nor any of the usual incidents of an agency relationship. The court erred in implying an agency in the absence of any proof thereof. *Moline Properties Inc.* v. *Commissioner*, 319 U. S. 436.

II

The judgment of the Circuit Court below is erroneous, in conflict with decisions of other circuits and irreconcilable with other Tax Court decisions.

The Commissioner's original explanation of the deficiency assessment against the petitioner (R. 28a), The Tax Court opinion (R. 239a, 253a) and the Circuit Court opinion (R. 266) all stress the option grant's recital of the *optionee's desire* as the keystone of the structure upon which they project *petitioner's* alleged obligation as petitioner's end in view and to which they subordinate all subsequent occurrences. This unmistakable error arises: (1) from failure to distinguish between the two alternatives of optionee's desire and the one indicated choice of optionors. Optionee wanted assets, either directly by transfer thereof or indirectly by means of shares of a corporation which would own those assets. His choice was not expressed in the unilateral option grant of January 1937, except as may be gleaned from the "Whereas" clause reference to "as hereinafter set forth". No choice is indicated in any succeeding portion of that instrument except the indirect one of "shares" (R. 150a-156a). On the other hand it was not disputed that when Jones started the discussions regarding an option, he asked only for an option on shares. The natural inference arises therefore that the express reference to assets was inserted as a means of providing a yardstick for the variable price payable for the shares according to the changes in net assets that would occur between option date and prospective settlement date. It was not a short time contract; the petitioner was a business concern; it was nat-

ural that it would not stand still; its value—the value of its shares—would fluctuate according to the value of its assets in the interim; (2) from failure to note that petitioner could not be bound by the option instrument which was not executed by it and which in terms of grant covered shares only. Petitioner's shares were all issued, therefore the stockholders were not speaking for petitioner but for themselves. This clearly appears from their listing of their holdings alongside their signatures to the option grant (R. 156a); (3) from failure to give heed to the right of election reserved to optionors exclusively, namely to substitute new shares for petitioner's shares (R. 150a); (4) from failure to recognize that optionors, when they accepted the liquidating distribution six months later, were not yet bound to substitute direct assets for the shares. Therefore at the latter time, neither the optionors nor the petitioner could have had an asset sale in view as a determining factor, if it were merely based on a hope than an ultimate deal would emerge. There had been too many extensions requested to give any assurance of a deal eventuating—there were a large number of changes constantly being made—no one knew to what lengths the prospective purchaser might press. If in the face of this clear record of absolutely no participation on petitioner's behalf in the preceding negotiations, *a plan of sale* can be evolved by judicial inference of intention directly opposite to the *plan of liquidation* which the parties meticulously provided for, implemented and carried out—without regard to the ensuing fate of the assets distributed—then indeed the statute protecting *bona fide* liquidations against corporate income tax has lost its meaning and become a dead letter.

The decision and judgment below deprive petitioner unlawfully of the benefits of Section 115(c) of the Revenue Act of 1936. In the case at bar all concomitants of a *bona fide* liquidation were present: a curtailment of activities; an orderly process of cessation of those activities; a definitive two year plan adopted and adhered to; retirement and cancellation of stock against distribution of the liquidating dividend in kind; operation of the business by the recipients of that dividend, before definitive terms with respect to the sale thereof had been mutually agreed upon, between the partners and the purchaser; absence of any strings upon the liquidating dividend distribution that would preclude the recipients from choosing whether or not to sell assets instead of shares. They were under no obligation to sell those assets prior to the making of the July 22d contract of sale. The unilateral option of January obliged them to sell shares of stock only, regardless of the fact that it was immaterial to the optionee at that time whether he obtained shares or assets. That the optionee's assignee had a different view, and desired assets only, not shares, in July, has no influence upon the determination of the *bona fides* of the transactions of January or July.

The courts below overlooked the fact that in the absence of a commitment by the corporate petitioner with relation to its business assets, the law does not inhibit the stockholders from making anticipatory arrangements with respect to property they expect ultimately to receive.

In the recent case of *George T. Williams* v. *Commissioner* (decided June 19, 1944), 3 T. C. 1002, it was held that an agency relationship may not be implied from the mere fact that a sole stockholder of a corporation in

process of dissolution contracts as an individual to sell property which he expects to receive as a distribution in liquidation. There no agreement to sell the assets was contemplated to be made, nor was any made, until after corporate action with respect to distribution was completed, although the negotiations occurred simultaneously. That decision expresses a sounder view of applicable law, than underlies the decision at bar.

The decision below is in sharp conflict with the recent fifth circuit court decision in *Court Holding Company* v. *Commissioner,* 143 F. 2d 823, reversing 2 T. C. 531. There The Tax Court attributed the stockholders' sale of a distributed asset to the corporation from which derived, and the Circuit Court held it to be reversible error since concededly the contract of sale was not executed, nor were the stockholders legally bound to make the same, until after the distribution had occurred. The time element was held to be the controlling one, although negotiations were concededly conducted on petitioner's behalf to the very point where a finished draft of a contract emerged with all terms satisfactorily agreed upon, but the corporate officers—who were also the sole stockholders—changed their minds after the parties had met for the purpose of signing the papers, and instead proceeded to liquidate, in order to reduce the impact of the expected income tax. The stockholders' names were simply substituted for that of the corporation as vendor and the substitute contract was signed almost immediately after the distribution was effected. In the *Meurer* case at bar, there is absolutely no proof of any negotiations whatever conducted by the petitioner or on its behalf. The shareholders' attorney had given notice some six months earlier, that he would never recommend a sale by the corporation. That was long before any prospective

purchaser had appeared on the scene. Moreover in the instant case, no understanding as to all the terms were reached until five days after the distribution had occurred. Although the Meurer Tax Court decision (unofficially reported) was cited in the Commissioner's brief before the Circuit Court, it was ignored and the reversal was on the express authority of *Commissioner* v. *Falcon* (*infra*) in that circuit.

In *Commissioner* v. *Falcon*, 127 F. (2d) 277 (C.C.A.—5; affirming 41 B.T.A. 1128), Falcon Company, on February 8th (1934) received a written offer from Texas Company (outside interests), for certain oil and gas leases which it owned. Negotiations then followed and continued to February 19th, when Falcon's directors decided not to sell to anyone, on account of the large taxes involved. Instead on February 23d the stockholders adopted a resolution providing for a distribution of the leases to them as a partial liquidating dividend, and on the same day the leases were so transferred by absolute, unconditional conveyance against reduction of the outstanding stock. Later that same day, the stockholders, as the new owners, received a formal written offer from the Texas Company, which referred back to the prior negotiations with the corporation. The stockholders thereupon made a contract of sale with the Texas Company and conveyed the property. The Commissioner contended that the sale was made by the Falcon Co., or if not by it, then by its stockholders merely as agents. The Board on the authority of the *Chisholm* case (*infra*) held otherwise and was affirmed, specifically on the ground *that there was no sales contract in existence* when the liquidating distribution took place. The Circuit Court in its opinion in that case followed the second circuit in *Chisholm* v. *Commissioner*, 79 F. 2d 14,

and held inapplicable the case of *Embry* v. *Glynn*, 116 F. 2d 682 (C.C.A. 6), on which the greatest reliance was placed by the respondent below.

The second circuit court decision of *Chisholm* v. *Commissioner*, 79 F. 2d 14, is an additional authority for the required reversal of the decision below. The courts below in the case at bar erred in distinguishing that case. Judge Learned Hand, in his opinion said (p. 15):

> "The Commissioner first argues that the sale was made when Krauss & Co. notified the five sellers that it would take up the option. Clearly this was not the case; the option was an offer to sell, not to contract to sell; it required payment; not a promise to pay, and the notice, not corresponding with the offer, was legally a nullity."

At bar the optionee was never willing to exercise the option according to its terms. Even if it were, its mere notice of readiness so to do would not have been sufficient to constitute a contract, if the doctrine of the *Chisholm* case prevails. See also *Jemison*, 3 B.T.A. 70; *Conservative Gas Co.*, 30 B.T.A. 552; *W. B. Hobby* v. *Commissioner*, 2 T. C. 980.

Dobson v. *Commissioner*, 320 U. S. 489; *Gregory* v. *Helvering*, 293 U. S. 465; *Helvering* v. *Elkhorn Coal Co.*, 95 F. 2d 732; *Minnesota Tea Co.* v. *Helvering*, 302 U. S. 609; *Higgins* v. *Smith*, 308 U. S. 473; *Griffiths* v. *Commissioner*, 308 U. S. 355, cited in the opinion of The Tax Court or circuit court below, are inapplicable on account of the entire absence of any substantial evidence to support the inferences and conclusions made by the courts below: that *petitioner* at any time had as an end in view the sale of its business assets to Rheem, shaped events

to accomplish that end or participated in negotiations for such sale. The facts briefly marshalled in the foregoing point necessarily required the separate recognition of (1) the first liquidating dividend distribution under the adopted plan of complete liquidation within the scope of Section 115(c) of the Revenue Act of 1936 and (2) the partners' ownership of business assets as *bona fide*, absolute and unrestricted.

The respondent below relied strongly on the sixth circuit case of *Embry Realty* v. *Glenn*, 116 F. 2d 682, the third circuit case of *S. A. Macqueen* v. *Commissioner*, 67 F. 2d 857, the fifth circuit case of *Taylor Oil Gas Co.* v. *Commissioner*, 47 F. 2d 108 and the fourth circuit case of *Tazewell Electric Light & Power Co.* v. *Strother*, 84 F. 2d 327. Upon analysis it will be found that in each instance one or more of the following significant elements were present rendering those cases inapplicable: (a) the transfer by the corporation was conditional, not absolute; (b) the distribution was intended to apply to the proceeds of ultimate sale of the property distributed; (c) the corporation or its stockholders were irrevocably committed to all terms of a proposed sale of specifically identifiable property previously accepted by an optionee or prospective purchaser before the distribution of the liquidating dividend was declared or carried out; (d) the transfer was expressly to a trustee to carry out a previously arranged sale; (e) the initial transferee clearly acted simply as a conduit without performing any business purpose or function whatever, or (f) other factors were involved clearly showing a lack of *bona fides* in the distribution, such as acceptance of the distribution at a grossly unfair valuation.

Conclusion

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its appellate and supervisory jurisdiction and that to such end a writ of certiorari should issue.

N. Y., October 19, 1944.

Respectfully,

Emanuel A. Stern,
Counsel for Petitioner.